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IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, EMILY ELIZABETH STEPHENSON, JOE ISAACSON, and PHYLLIS LISA ISAACSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Stephenson v. Dow Chemical Co., 273 F.3d 249 (2d Cir.2001) ..... *passim*

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Big Class Action, at *http://www.bagclassaction.com/settlements/consumer.html* (reporting class action settlements and verdicts) (last visited Dec. 18, 2002) 29

Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. ILL. L. REV. 21 20

Bruce Vincent, *Suit Claims Chrysler Hid Latch Defect*, TEX. LAW., Dec. 18, 1995 29

Class Action Reports Inc., at *http://www.classaction reports/stats2.htlm* (reporting federal class actions filed through 2001) (last visited Dec. 11, 2002) ... 27, 28

Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995) 17

Federal Jurisdiction & Procedure, 116 HARV. L. REV. 332 (Nov. 2002) 27

Geoffrey P. Miller, *Full Faith & Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silverman*, 73 N.Y.U.L. REV. 1167 (1998) 23

Heart Valve Maker Settles Suit, CHI. DAILY L. BULL., Aug. 20, 1992, at 1 29

Cited Authorities

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Judge Oks Race Bias Pact, NAT'L L.J., Feb. 8, 1993, at 21, col. 1	29
Marcel Kahan & Linda Siberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.* 73 N.Y.U.L. REV. 765 (1998)	23
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INTEREST OF THE *AMICUS CURIAE*

The Defense Research Institute ("DRI") is an organization with more than 21,000 individual lawyer and 400 corporate members throughout the United States. It seeks to advance the cause of the civil justice system in America by ensuring that issues important to the defense bar, to its clients and to the preservation and enhancement of the judicial process are properly and adequately addressed.

These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, through testimony before Congress and state legislatures on select legislation impacting the civil justice system, and by participation as *amicus curiae* on issues of significance to the defense bar and its clients. DRI also provides a national forum for networking by members of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.[1]

SUMMARY OF ARGUMENT

When a defendant enters into a class action settlement, as with all settlements, the most important benefit that the defendant receives, indeed, the only benefit the defendant receives, is that it will no longer be subject to lawsuits or claims based on the issues underlying the class action. Once the trial court approves a class action judgment or settlement and direct appeals are exhausted, the parties, including a defendant, should be able to rely on the final judgment as being truly final. This is the sole benefit of the bargain that inures to the defendant following a class action settlement, which is a contract validated as to its fairness by the court. It is in the defense of this bargained-

1. Pursuant to Rule 37(6) of the Supreme Court of the United States, DRI states that counsel for petitioner and respondent had no part in authoring any portion of this brief. No one other than DRI made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a) of the Supreme Court of the United States, DRI states that all parties to this case have consented to the filing of *amicus curiae* briefs.

for benefit, not only here, but as much more broadly implicated in virtually all class action settlements, past and future, that *amicus curiae*, the Defense Research Institute, speaks.

The Second Circuit's decision in this case creates a virtually limitless right of so-called "absent class members" to collaterally attack a class action settlement on the grounds of "adequacy of representation."[2] The Second Circuit's flawed analysis ignores certain indisputable facts, including that the incorrectly denominated "absent" class members (a) received fair notice under the law in this case[3]; and (b) had their full and fair opportunity to challenge the adequacy of their representation as class members in the trial court at the time of the settlement approval.[4] Simply put, plaintiffs in the suit below were not "absent" class members, they were class members who derived specific benefits by their inclusion within the class. Their interests were adequately represented despite the fact that they claim otherwise now. Furthermore, the Second Circuit's decision fails to give appropriate judicial recognition to the fact that the trial court had already determined that the class representatives were adequate for the entire class, which determination was twice affirmed on appeal. Essentially, the Court of Appeals decision broadly states that an "absent" class member can challenge the adequacy of representation in a class action if he can articulate any culpable reason, including any changes in the

2. Presumably, the legal principle, to the extent one exists (which *amicus curiae* denies), on which the Second Circuit has created such an unfettered right to attack a final judgment could be applied with equal vigor to any circumstance that might cause someone to second guess a class settlement after it becomes final.

3. As recognized by the Second Circuit's opinion, the notice standard is, "notice 'reasonably calculated to apprise interested parties of the pendency of the action.'" *Id.* at 260.

4. The Second Circuit acknowledges the procedural history of the underlying claims and class action settlement, but fails to accord the careful and correct substantive and procedural undertakings by the trial court any deference. *See*, *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001).

law or facts that would affect the initial class action settlement had it been known then. Under such a rule, no class action settlement, past, present or future is beyond the pale of attack.

Under the Second Circuit's analysis, the finality of every class action settlement, and judgment entered thereon, as approved and finalized by any court, even after direct appeal or after the time for appeal has passed, is subject to an attack based upon virtually any claim that the settlement was unfair or that a class member was not adequately represented. At a time when both the plaintiff and defense bar must increasingly rely on class actions to obtain settlements of claims with multiple plaintiffs, the Second Circuit's ruling undermines and seriously threatens the usefulness of the class action device as a method for resolving such litigation. More importantly, it is antithetical to important legal policy principals, including predictability[5], mutuality and finality.

Although this Court has recently given new guidance as to how the class action settlement requirements are to be analyzed, the Second Circuit's decision goes far beyond this Court's ruling in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591(1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).[6] Despite the

5. Sound judicial policy should be based on judicial economy, fairness, predictability and clarity. *See*, *e.g.*, *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n*, 755 F.2d 366, 372 (D.C. Cir. 1985) (discussing the judicial goals of "clarity, consistency, judicial economy, efficiency and the avoidance of needless expense"); (in ruling on matters, "courts should consider the preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and possibilities for confusion").

6. *Amchem* and *Ortiz* require a trial court, in certifying a class action, to secure "structural assurance of fair and adequate representation for the diverse groups and individuals affected" by a class action settlement were present and conformed with due process. *Amchem*, 521 U.S. at 626; *Ortiz*, 527 U.S. at 856. This was a somewhat more stringent and specific standard than that which governed the pre-*Amchem* jurisprudence, which required that the settlement be "fair, adequate and

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lack of any cognizable legal policy reason for doing so, the Second Circuit's decision provides a limitless power to collaterally attack a class action settlement by previously bound class members who are willing to do so. All that is necessary is for such class members to claim they were not adequately represented and thus, they were not bound by the class settlement. Under that analysis and approach, defendants who settle class claims literally cannot protect themselves against future litigation after a class settlement is reached. If that is the case, the judicial policy favoring settlement will be completely frustrated.[7] Additionally, if any such a broad collateral attack is to be permitted, which *amicus curiae* steadfastly opposes, sound judicial policy requires that this Court not retroactively apply the class action law of today to the Agent Orange settlement of 1984.

I. The Second Circuit's Expansive Collateral Attack Ruling Shakes The Foundations Of Every Class Action Decision In This Country And Threatens To Undermine If Not Destroy One Of The Civil Justice System's Most Important Tools In Resolving Disputes.

The Second Circuit's decision permits a collateral attack on a class action settlement that has been final for nearly 20 years. Defendants who entered into the settlement of such disputed claims had no reason to anticipate that nearly two decades after they secured collective peace with the courts'

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reasonable", as a opposed to satisfying ordinary class action certification requirements. *Amchem*, 521 U.S. at 618, 621-22. By extending the class action certification "prerequisites" to settlement class actions, *Amchem* vastly expanded the necessary inquiry at the trial court level. There is no language in either *Amchem* or *Ortiz* that supports retroactive application of these standards, which is the approach embraced by the Second Circuit's decision in this case.

7. *See Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d.Cir 2001); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995).

blessing, they would be hauled into court yet again. Years after all the settlement funds have been disbursed, and after petitioners have relied on the trial and appellate courts' approval of the class action settlement to protect them from future "Agent Orange" litigation, two individuals otherwise bound by that settlement have mounted a collateral attack on the original settlement.[8] Respondents simply assert that they were not adequately represented in the original proceeding and as a result they could not be bound to the terms of the settlement. Such claims were pursued despite the fact the Second Circuit approved the original class settlement on two occasions. *See In Re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). Now, the Second Circuit has inexplicably reversed its earlier course by allowing a collateral attack in the instant case. The Second Circuit now allows a twice-rejected collateral attack on the class settlement, purportedly

8. The Second Circuit, avoiding a discussion of the true result, suggests that plaintiffs are not attacking the class action settlement at all by its assertion, "Plaintiffs do not attack the merits on finality of the settlement itself, but instead argue that they were not proper parties to that judgment. If plaintiffs were not proper parties to that judgment, as we concluded below, res judicata cannot defeat their claims." *Stephenson*, 273 F.3d at 259. Despite plaintiffs' efforts to claim otherwise, they do directly attack the sanctity of the class action settlement and judgment by the district court. In effect, their argument is that anyone otherwise bound by the class action settlement can escape its effect by coming into court alleging that their interests were not adequately protected. Such claims can be asserted under the Second Circuit's analysis irrespective of the merits of such claim, as the Court held –

> We are therefore concerned only with whether they were afforded due process in the earlier litigation. Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts. The claims' ultimate merits have no bearing on whether the class previously certified adequately represented the plaintiffs.

Id. at 261.

based on both newly announced legal standards[9] that did not exist at the time of the original determination.

To fully appreciate the potentially broad application of the decision of the Court of Appeals below, one need only look briefly at the history surrounding this case. The "Agent Orange" controversy was a lightening rod for media coverage from the 1970s through the 1990s. Government use of various defoliants, combined with belated sympathy for Vietnam veterans and the burgeoning environmental movement pushed this issue to the forefront of the collective national consciousness. It is inconceivable that at the time of the initial class action determination in this case that the overwhelming majority of, if not all, Vietnam veterans were well aware of their exposure to "Agent Orange" and had notice of their stake as class members.[10] Those who were not ill in 1984 either knew or should have known that they could be directly impacted by the class action settlement if they developed symptoms they attributed to "Agent Orange." If the "window" of benefits set to expire in 1994 was not enough to protect them or others, they certainly had the opportunity to timely object to the terms of the settlement. Judge Weinstein below, based upon the existing law and facts as known

9. It is not uncommon for parties to regret, for good reason, a past settlement. Often it is because some subsequent event occurs which makes liability, damages or some other pertinent factor clear, when at the time it was not. Presumably, a class member could attack a settlement of a class action by arguing class counsel should have more vigorously pursued certain avenues of discovery, critical liability facts would have been uncovered. This is true despite the fact that the critical information did not become public knowledge until decades after the settlement. There is no end to the mischief the Second Circuit's decision portends.

10. Rule 23 requires, under the circumstances, the best practicable notice be given to class members. The district court provided notice be given to class members by mail, as well as by television, radio and print media over the course of several months from March 1984 through the early summer of 1984. The Second Circuit found that notice to meet the requirements under the rule. *Stephenson*, 273 F.3d at 255.

and knowable, crafted a useful mechanism for future recovery, with a fixed endpoint for benefits that expired on December 31, 1994.[11]

Based upon the information available when the settlement occurred, there was no reason to differentiate between pre-1994 and post-1994 injuries. The year "1994" though arbitrary, was not arbitrarily chosen. The "science" purporting to support plaintiffs' claims was so weak that the trial court judicially concluded that after the 1994 date plaintiff class members would have many ailments that were similar to those asserted on behalf of the class, yet they could not be traceable to exposure to Agent Orange.[12] *See*, e.g., *In Re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1376, 1418 (E.D.N.Y. 1985). In simple terms, the Court concluded that as the class members grew older and experienced

11. The Agent Orange class was composed of

> those persons who were in the United States, New Zealand or Australia Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984 directly or derivatively injured as a result of the exposure.

In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 756 (E.D.N.Y. 1984).

12. The Second Circuit's analysis may be as simple as this, you cannot be bound by a class action settlement if you received no direct payment under its terms. It found that,

> It is true that on direct appeal and on the Ivy/Hartman litigation we previously concluded that there was adequate representation of all class members in the original Agent Orange settlement. However, neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds.

Stephenson, 273 F.3d at 258-59.

the maladies that accompany the aging process, the already scant "science" suggesting a causal connection with "Agent Orange" would exceed the outer limits of medical probability.[13] Thus, a final date, which had to be chosen, was set as a limit on recovery for future claims and benefits.

Presumably, the Second Circuit decision was in part a reflection of its belief that respondents receive no benefit from the class settlement. While that should not impact the sanctity and finality of the class action settlement and judgment, it is also simply not true. First, the $35 million set aside for the Class Assistance Program eventually became $71.3 million, and was at least of indirect benefit to them, as is true as to all other class members. Additionally, they were protected class beneficiaries under the terms of the class settlement agreement during the liability window established under its terms. Merely because they did not develop symptoms within the window does not mean they were not protected and did not receive benefit from the settlement. Neither of these benefits would have been available to them except for the terms of the settlement they now attempt to disavow.

By allowing purportedly "absent" class members to collaterally attack the Agent Orange settlement, the Second Circuit has pushed the envelope as to when such a collateral attack may occur over the brink of rationality. Unknowingly, the Court of Appeals has ushered in a judicial construct that places virtually no value on a defendant's right to finality in a class action settlement context. It has also subverted the "important policy interest of judicial economy," which is served by "permitting parties to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of a class action.'" *C.L. Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994).

13. As Judge Weinstein stated during the hearing in the instant case, in summarizing the lack of scientific data to support plaintiffs' claims, "[h]ad there been no settlement, there would have been no recovery for the veterans."

This Court has long recognized the "vital public interests" served by the finality, clarity, certainty, and predictability that *res judicata* promotes. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). It has defined *res judicata* as, "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." *Id. citing Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). Respondents' alleged rights and interests here do not outweigh or countenance overriding the vital purposes served by *res judicata* and collateral estoppel, which are to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Respondents seek a potential windfall by attempting to litigate their claims separately from the class to which they belong. This Court has made clear that collateral attacks will not be sanctioned where litigants seek a windfall by claiming they are not bound by a prior judgment. *See id.* at 400-01. The words of this Court spoken years ago in *Reed v. Allen*, 286 U.S. 191, 198-99 (1932), ring as true today and pinpoint why a collateral attack on a class settlement nearly 20 years old by plaintiffs who are within the class should not be upheld:

> The predicament in which respondent[s] fin[d] themselves is of [their] own making . . . . [this Court] cannot be expected for [their] sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation — a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.

Moreover, the *res judicata* effect of the court-approved settlement cannot be "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated*, 452 U.S. at 398. A "final judgment" of the scope and magnitude here cannot be collaterally attacked based on subsequent precedent or factual developments without creating "uncertainty and confusion" and "undermining the conclusive character" of court-approved settlements, "consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Federated*, 452 U.S. at 398-99. The time-honored propositions quoted in *Reed* explain why the Second Circuit's decision to apply *Amchem* and *Ortiz* retroactively to permit a collateral attack is unjustifiable:

> . . . all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the right of the parties. It would undermine the foundation of the principle upon which it is based if the Court might inquire into and revise the reasons which led the court to make the judgment. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been susequently [sic] reversed, that is any the less effective as an estoppel between the parties while in force.

Reed, 286 U.S. at 199-200, *quoting Deposit Bank v. Frankfort*, 191 U.S. 499 (1903). By allowing this unprecedented collateral attack two decades after the trial court's final approval of the class settlement, which was twice upheld on direct appeal, the conceptual framework and practical benefits of a Rule 23 settlement are being grossly subverted and perhaps destroyed.

As briefly mentioned, important principles are at stake here, including that of mutuality. A defendant would never be allowed to collaterally attack a class action settlement based on a change in circumstances, whether legal or factual, as the following hypothetical demonstrates. Consider that an airline and

manufacturer of the aircraft involved in a crash agreed, in a class action settlement, to pay benefits to the estates of over 200 individuals who perished. The class action lawsuit alleged a defective fuel tank caused a mid-air explosion of the airplane, resulting in the untimely deaths and seeking actual and punitive damages. Under the impression that there was potential liability for compensatory damages and some potential for punitive damages (while denying same in the settlement papers), the airline and the manufacturer agreed to pay a substantial sum of money to the surviving heirs of each passenger. Many years after the settlement is finalized and approved by the trial court, and the time for direct appeal has passed, new findings surface that call into question the basis for the class action settlement. Simultaneously, a government investigation of terrorism determines that it was not, in fact, a fuel system defect in the ill-fated airplane, but rather, a ground-to-air missile, launched by a terrorist group, which caused the explosion and subsequent crash. Unquestionably, it is now patently clear to all parties that there was no defect in the design, manufacture or maintenance of the plane which caused or contributed to the mid-air explosion. Instead, it was an act of cowardice in an undeclared war by an extreme terrorist group that ended more than 200 lives. Could the airline or manufacturer of the aircraft reopen the class settlement based on this information, seeking to recoup the money mistakenly paid out in settlement? The answer would be a resounding "no." Despite the "unfairness" of such a result, it is the right result.[14]

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14. A "real-life" example of the above airline hypothetical is found in the continuing saga of "breast-implant" litigation. Although numerous cases were settled in the early 1990s, including class action cases, the science regarding the alleged adverse effects of these implants was not well developed. As additional scientific studies were performed, it became clear that rates of immune-related diseases and connective tissue diseases (the primary claim of the plaintiffs in breast implant cases) were not higher for women with silicone breast implants, according to

(Cont'd)

Plaintiffs in this case, however, seek to reopen a court-approved class settlement based on a much less convincing argument. Plaintiffs have cast themselves in the role of "absent class members" whose interests were inadequately protected in the 1984 settlement.[15] The alleged "inadequate representation" is based on their effort to spin-doctor their status in 1984 as being different from other potential class member who likewise had not yet suffered any alleged health effects from Agent Orange as of 1984. They were not then nor are they now different than

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studies of the Mayo Clinic and the Harvard Nurses' Health Study. *See* Marian Segal, *"A Status Report on Breast Implant Safety"*, November 1995, FDA Consumer. Shortly thereafter, Judge Pointer, the Coordinating Judge for the Federal Breast Implant Multi-District Litigation, appointed a neutral panel of scientists to determine whether scientific data supported plaintiff's claims that silicone breast implants caused connective tissue disease and immunologic dysfunction. Their report, in summary, concluded on November 30, 1998 that there was no scientific support for such claims. *See, Silicone Breast implants in Relation to Connective Tissue Diseases and Immunologic Dysfunction*, A Report by a National Science Panel to the Honorable Sam C. Pointer Jr. Coordinating Judge for the Federal Breast Implant Multi-District Litigation, pp. 1-8 (November 30, 1998). Would it be appropriate for breast implant manufacturers to seek to re-open past settlements, class action or otherwise, to address this information? "No" is the simple answer yet plaintiffs in this case seek the same type of relief.

15. As noted, plaintiffs, with the Second Circuit's blessing, seek to avoid the application of the doctrine of mutuality by contending they were never bound by the class settlement and judgment (*See* n.8). Apparently, if these two plaintiffs had developed symptoms on or before December 31, 1994, they would be bound and mutuality would apply, but because they did not, they magically are not bound. This approach ignores the fact that the district court had concluded that the 1994 cutoff was fair based upon all that was known and knowable at the time. Now, second-guessing what the trial court found as fair, the Second Circuit creates its own *ad hoc* subclass of persons who manifested no injury by December 31, 1994 and concludes that its new subclass was not adequately represented.

all of the other class members who had not yet developed any identifiable symptoms from exposure. In fact, all individuals who were not ill in 1984 were represented, and a fund was created that would disburse benefits for a 10-year period following the settlement approval.[16] If the plaintiffs below had developed symptoms of any specific illness listed in the settlement before 1994, they would have received benefits. Because they did not develop symptoms in that time-period, they were not eligible to receive direct monetary payments from the class settlement. All class members, including plaintiffs below, did receive the indirect benefit of the monies paid to various Vietnam Veterans' agencies. Plaintiffs were certainly within the group, all "Agent Orange" exposed and injured individuals, which the trial court and Second Circuit found to be adequately represented.[17]

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16. The settlement provided that defendants would pay a total of $180,000,000 into a settlement fund. *Stephenson*, 273 F.3d at 252. $10 million of this fund would indemnity defendants against future state court actions alleging same claims. *Id*. The majority of the $180 million settlement proceeds (75%) were to be distributed to veterans and surviving spouses or children from January 1, 1985 through December 31, 1994. *Id*. at 253. This amounted to roughly $135 million (75% of $180 million). The remaining roughly $35 million ($45 million minus $10 million for indemnity) was to be used to establish the Agent Orange Class Assistance Program, which made grants to entities serving Vietnam veterans and their families. *Id*. Ultimately, the fund paid out $196.5 million. *Id*. at 255. Of that amount, $73.2 million was paid to veterans with injuries on or before May 7, 1984, $52 million was paid to veterans whose injuries manifested after May 7, 1984, and $71.3 million was paid to the Class Assistance Program. *Id*. The $10 million originally set aside for indemnification was transferred back to the district court and was paid as part of the $71.3 million distributed by the Class Assistance Program. *Id*.

17. The Second Circuit concluded that for purposes of the Agent Orange litigation, "injury occurs when a deleterious substance enters a persons body, even through its adverse effects are not immediately apparent." *Ivy/Hartman*, 996 F.2d at 1433-34. Of course, this would include plaintiffs.

Based on subsequent favorable application of the military contractor defense and the complete paucity of evidence supporting a causal link between Agent Orange and health problems, defendants, like the airline in the above hypothetical, could conceivably challenge the 1984 court-approved settlement. Legal principals of finality, however, would bar such a claim. Similarly, plaintiffs' collateral attack on the 1984 judgment should be rejected to appropriately uphold the principle of finality that is at the core of all settlements in our civil justice system. Mutuality, a corollary but no less important legal principle, mandates that the same rule of finality must apply to all parties to a class action settlement. Final judgments approving a class settlement must be given a fair meaning and be extended to protect those who have settled irrespective of whether they are a plaintiff or defendant.

II. The Defendants' Interest In Finality Outweighs A So-Called "Absent" Class Member's Interest In Having Their Day In Court, And To Undermine Such Finality Denies Defendants Due Process Of Law, While Undermining The Usefulness Of Class Action Settlements In Our Civil Justice System.

In a typical non-class action settlement, a defendant receives nothing from a plaintiff other than the legal assurance that it will never again be subject to a claim or a lawsuit for the settled claims in that case. This is the benefit of the bargain which is "purchased" by the defendant through an exchange of consideration, usually a monetary payment. By settling a case, defendant obtains a shield, which forever protects it from any attempt by plaintiff to recover damages against the defendant within the scope of the matters settled.[18] Regardless of the terms

18. Defendants, of course are not claiming that a settlement or judgment is never subject to collateral attack. The exceptions to this rule, not present here, would include cases where plaintiffs can prove fraud, misrepresentation, bad faith, duress, undue influence, or inadequate consideration. The instant case does not involve such

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used to describe this bar, whether it be "*res judicata*" or "collateral estoppel", settlement acts to prohibit future claims that fall within the scope of the settlement, and is the single asset taken by a defendant from any settlement. Without the assurance that the litigation is finally over, a defendant would never engage in settlement talks, much less agree to pay money for nothing.

In a class action context, the bar to future claims and lawsuits is of even greater importance to the defendant. Class action settlements are many times reached early in litigation in an effort to resolve the claims and thus often occur without defendant fully developing liability defenses that might effectively defeat a plaintiff's claims. As is the case in any settlement, but more significantly in settling class action claims, numerous factors are taken into account, including the current law on important issues, the facts relevant to liability and damages, the proclivities of the trial judge and jury pool likely to decide the controversy, the ability of the opposing counsel, and a host of other factors, depending upon the circumstances.[19]

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allegations so any issues regarding the standards for collateral attack in such egregious situations is not before the Court and need not be addressed.

19. In examining the fairness of the class settlement, Judge Weinstein considered multiple factors. He considered 14 separate categories of concerns expressed by class members, ranging from concerns regarding financial help for those too ill to work to the need to settle now "to get on with life." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 764-72 (E.D.N.Y. 1984). Judge Weinstein also examined the factual problems with the plaintiffs' claims, specifically addressing "evidence of causality," "Scientific Studies on Casuality" and "knowledge of government and defendants." *Id.* at 799-851. He examined government action on the issue, before announcing his approval regarding the fairness of the plan and the "nuts and bolts" of administering the settlement. *Id.* at 851-62. Indeed, it is difficult to imagine a more detailed or thoughtful consideration of fairness issues under the class action rules in existence at the time of Judge Weinstein's decision.

Because of the vast number of individual claims by plaintiffs, defendant generally does not develop case-specific liability and damage evidence as to each and every individual plaintiff prior to a class settlement. Such evidence might lower the value or even eliminate individual plaintiff's claims (particularly in cases involving personal injury). In the class action context, the best claims are lumped in with the worst claims, and though there may be different levels of recovery based on various factors associated with particular class plaintiffs, all plaintiffs receive a negotiated "fair share" of the settlement proceeds paid by the defendant.

Defendants often, as is true here, settle class action cases because to do so is the most efficient means to deal with the possibility of hundreds or thousands of lawsuits.[20] This is true even when liability is, at best, thin. Without the class settlement vehicle, such litigation could drain a corporation of significant financial resources, the vast majority of which would otherwise be paid in legal fees to defend multiple cases or paid in verdicts to a few plaintiffs in certain plaintiff-friendly venues. In reaching a class settlement, a defendant sometimes pays a premium that would not be justifiable based on an individual case evaluation, but it does so because it receives, in return, the assurance that it will never be haled into court for the wrongs covered within the scope of the settlement. Furthermore, plaintiffs are not discriminated against based on factors beyond their control, such as the venue where their individual claim must be pursued.

The nature of mass tort class actions such as this one amplifies not only the public policies that require finality in litigation but also the potential for abuse of the broad new avenue for collateral attack established by the Second Circuit. As one

20. Approximately 123,531 potential class members, including Vietnam veterans, were sent notices of the Agent Orange class settlement. *In re: Agent Orange*, 818 F.2d at 167-68. This notice, in addition to media coverage and other notice required by the Court, resulted in an estimated 240,000 claims by 1987. *Id.*

commentator who has studied mass tort class action settlements, such as the Dalkon Shield IUD litigation, observed:

> Mass personal injury litigation also appears to stimulate a higher rate of claiming than is associated with ordinary personal injuries. . . . The precise rate of claiming in mass torts is indeterminate because no databases record the number of people who have used the products involved in the various litigations and who have been injured. In response to notices of the pendency of Dalkon Shield manufacturer A.H. Robins' bankruptcy, 327,064 plaintiffs filed claims. The court determined that 197,000 plaintiffs demonstrated sufficient evidence of using the Dalkon Shield to merit payment. These numbers represent 13% and 8% respectively of the 2.5 million IUD users in the United States, of whom an unknown but smaller number were actually injured by the Dalkon Shield. Of the 180,000 people reportedly affected by salmonella-contaminated dairy products marketed by Jewel Food Stores, 30,000 — about 17% — filed claims against Jewel Food. These numbers suggest that claiming rates may be at least two to three times higher than for product-related injuries generally. Whatever the overall rate of claiming, the history of mass torts has shown that publicizing the possible link between product use and injuries and the availability of legal remedies — whether through mass media coverage, lawyer advertising, or court-ordered notices — results in a large increase in the number of claims that are filed. . . .

Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1598-99 (1995). In this case, all who were exposed to Agent Orange, including plaintiffs, had a right to benefits under the class settlement. Like

the other mass tort actions cited in the previous example, this one was highly publicized. The "numerosity, commonality, interdependence of case values, scientific controversy, heated emotional atmosphere, and increased propensity to claim," not only increased defendants' exposure to liability but also increased all potential plaintiffs' opportunities to participate, make their claims known and receive benefits. Hensler, *supra*, at 1600.

Currently, parties must meet the *Amchem* and *Ortiz* requirements in order for a class settlement to be approved by the court under the present interpretation of Federal Rule of Civil Procedure 23. Prior to the *Amchem* decision, individual courts crafted divergent standards in their interpretation of federal class action rules, but most often, the individual class action settlements were approved by the district courts and subject to direct appeal, just as this instant case was appealed twice to the Second Circuit.

The Second Circuit's decision in this case goes far beyond any constitutional or statutorily required approach. Likewise, it goes far beyond holdings involving class action law under Rule 23 as promulgated by this Court.[21] The Second Circuit's ruling essentially nullifies the only benefit a defendant receives in a class action settlement, the benefit of finality. By effectively taking from defendants this single but significant benefit, the Second Circuit ignores not only the precedent of this Court, but also ignores the critical importance of finality to the fair and efficient administration of our civil justice system.

Finality, indeed, is a bedrock principle in our civil justice system, and the principle is "administered" by the courts through the doctrine of *"res judicata"*. *See, e.g., Southern Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897). When parties settle a class action or a judgment is rendered in a class action, the

21. It is assumed without any discussion in the Second Circuit's opinion below that *Amchem* and *Ortiz* are to be given retroactive effect. Not a single word in either of these decisions supports such an application.

Court's determination normally binds absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1984). "As a judgment, the settlement and release of claims is a contract that not only is agreed upon by the parties, but also is stamped with the imprimatur of the court with jurisdiction over the parties and the subject matter of the lawsuit." *C.L. Grimes*, 17 F.3d at 1557. The best approach for the efficient administration of justice is to hold that the question of adequacy of representation in a settled class action cannot be reopened via a subsequent collateral attack. *See Epstein v. MCA*, 179 F.3d 641 (9th Cir.) *cert. denied*, 528 U.S. 1004 (1999). If an "absent class member" wishes to challenge a class action settlement, they should either opt out, object to certification or object to the settlement in the trial court. *Id.* Where the claims asserted fall within a court-approved settlement agreement and release, that judgment and contract precludes collateral claims by any class member, even if they object to the settlement, if the court employed "acceptable procedural safeguards," which include notice of the class action plus an opportunity to be heard and participate. *C.L. Grimes*, 17 F.3d at 1557, 1560-61, *citing Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 26, 32-33 (1st Cir. 1991).

Here, the court ordered extensive dissemination of notice by plaintiffs' counsel.[22] Plaintiffs did not object to the class

22. The following excerpt from the Second Circuit's opinion upholding the class settlement describes the notice ordered by the Court: (1) Written notice was to be mailed to (a) all persons who had filed actions in the federal district courts, or had filed actions in state courts later removed to federal court, that were pending in or transferred to the Eastern District; (b) all persons who had intervened or sought to do so; (c) each class member then represented by counsel associated with the PMC who had not yet commenced an action or sought to intervene; (d) all persons then listed on the United States Government's Veterans' Administration "Agent Orange Registry"; (2) Announcements were to be sent to the major radio and television networks, and to radio stations with a combined coverage of at least one half of the audience in each of the top 100 radio markets; (3) Notice was to be published in certain

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settlement, nor did they opt out, and cannot now be heard to complain. Respondents' effort to spin-doctor their status in the case below as "absent" class members is telling indeed. If they were not members of the class bound by the settlement, there would be no need to challenge the class settlement at all. Since they were to be bound by the terms of the class settlement, they were accorded the same rights to object or opt out as any other members of the class.[23] *See* Fed. R. Civ. P. 23. Whether the decision not to opt out or object was a conscious one or whether the result of inadvertence, the result is the same.

In looking at "preclusion rules", (claim and issue preclusion), their "classic" role in the legal system is to "bring litigation to a close." Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. ILL. L. REV. 21. This "spare[s] both victorious parties and the courts that burden of repeatedly litigating matters already decided." *Id.* The "classic role", however, is not the only important role of issue preclusion. As professor Hay points out, "by limiting in advance the number of times a claim can be litigated, preclusion rules determine a claim's expected value in court to each party." *Id.*

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leading national newspapers and magazines, in servicepersons' publications, and in newspapers in Australia and New Zealand; (4) A toll-free "800" telephone number was to be obtained and staffed by persons who would provide callers with basic information about the litigation; (5) Notice was to be sent to each state governor requesting that he or she refer the notice to any state agency dealing with the problems of Vietnam veterans. The notice sent to individual veterans . . . informed potential class members of the pendency of the class action and their right to opt out of the Rule 23(b)(3) class. The notice made clear that exclusion could be effectuated only by written request, and an "Exclusion Request Form" was attached to the notice for convenience. *In re Agent Orange Product Liability Litigation MDL No. 381*, 818 F.2d 155 (2d Cir. 1987).

23. If this were not a settlement class, but either a class certified for trial and tried to a defense verdict or had the trial court on motion for summary judgment entered judgment for all defendants, all class members including these plaintiffs, would be bound. Rule 23 contemplates they would be, because if not the rule would be useless.

In other words, if there were no preclusion rules, other factors, such as the relative wealth of the parties and/or their desire for repeated litigation would improperly skew the settlement value of lawsuits. Instead of the merits of the case determining the factors to consider for settlement, the spectre of re-litigation would force the party who was less able to wage war in the courts to give up a substantial amount of "value" during settlement negotiations.[24]

By stripping the mantle of finality from the Agent Orange settlement, the Second Circuit not only imperils closed cases, but also negatively impacts the ability of parties to settle future class action lawsuits based on the merits. The lurking possibility of a collateral attack poisons the well of settlement talks by eliminating a defendant's ability to call any settlement "final."

"Finality" is also enshrined in our jurisprudence in the area of statutes of limitation. This Court has correctly characterized the public policy behind such statutes, stating "[t]he statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." *See Walker v. Armco Steel Corp*, 446 U.S. 740, 751 (1980); s*ee also Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process.")[25]

24. The author does not believe that the abolition or weakening of claim preclusion would end the settlement of cases, as he is of the opinion parties would rationally sign agreements that would limit re-litigation. Professor Hay believes that the "main effect" of preclusion lies beyond the notion of bringing "finality" to proceedings *Id.* at 24. Rather, the preclusion rules prevent a party from "extract[ing] from her opponent a settlement unrelated to the merits of a dispute." *Id.* at 32.

25. For example, the statutes of limitations for personal injury actions vary widely from state to state, Fla. St. § 93.11(3) (four-year statute of limitations); Cal. Code Civ. Proc. § 340(3) (one-year statute of limitations, recently changed to a two-year statute by S.B. No. 688 (1)); Mo. Rev. Stat. § 516.120 (five-year statute of limitations).

In its analysis below, the Second Circuit, with the hindsight easily developed decades after an event decided that a ten-year window was not enough. Apparently, it believes that the district court got it wrong by not providing for a longer latency period. Interestingly, the Second Circuit has concluded that the trial court got it wrong, but it is just as likely the trial court got it right. For example, it may be that (a) there is indisputable medical evidence of alternate causation for the injuries about which plaintiffs Stephenson and Isaacson now complain, and (b) that it is scientifically certain no one after 1994 could have a medical condition caused by Agent Orange. The broad-based right to collaterally attack a class action settlement envisioned by the Second Circuit exists irrespective of whether there is any interest to protect at all. In other words, even if Judge Weinstein was right, not only on the law but on the science, the collateral attack as embodied in the opinion below is still available.

The opinion of the Second Circuit suggest that the strength of or merits of plaintiffs' claims in no way impact the issues of adequacy of representation and thus the right to pursue a collateral attack.[26]

It is inconceivable that is true. Rather it is unquestionable that adequacy of representation is inextricably intertwined with whether the settlement was fair and adequate, which directly implicates the strength and merits of the class members claims. Here, the trial court analyzed the potential impact of various liability issues such as the government contractor defense and the strength or weakness of the science surrounding the class claims. It is more than conceivable that petitioners paid nearly two hundred million dollars to settle meritless claims which had they been fully defended would have resulted in these plaintiffs and other class members receiving nothing. When class members, including plaintiffs, receive benefits under a

26. *See* n.8.

settlement which probably would not have been available if a decision on the merits had been reached, it is counter-intuitive to conclude they were not adequately represented.

The doctrine of finality dovetails seamlessly with the class action device, which is intended to determine the rights of multiple individuals with respect to similar claims against a defendant, by using an efficient system designed for such purpose. Permitting virtually unlimited collateral attacks, such as the one in this case, seriously "undermine[s]" the very efficiencies sought to be achieved by the class action mechanism." Marcel Kahan & Linda Siberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U.L.Rev. 765 (1998). Indeed, one commentator goes so far as to state that "all class action settlements however generous to the class, however competently litigated and however much the product of adversarial, arm's length negotiations between the parties, would be open to collateral attack in a subsequent forum." Geoffrey P. Miller, *Full Faith & Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silverman*, 73 N.Y.U.L.Rev. 1167, 1189 (1998). For countless legal policy and practical reasons, the Second Circuit's ruling must not be the law.

III. The Second Circuit's Attempt To Retroactively Apply Current Legal Standards And Factual Realities, In Hindsight, To The Agent Orange Decision Flies In The Face Of This Court's Limits On Retroactive Application Of The Law And Further Erodes The Bedrock Principle Of Finality, Upon Which All Settlements Are Built.

Whether these two plaintiffs were "adequately represented" in the class action litigation and global settlement approval, to which they were parties under the class definition, is an issue that goes directly to the merits of the 1983 class certification, the 1984 fairness hearing and the 1987 affirmation of both on

appeal.[27] Rather than viewing plaintiffs' representation in context of 1984 class action law, the Second Circuit has retroactively, and thus impermissibly, applied the *Amchem* and *Ortiz* decisions to support its conclusion that plaintiffs may collaterally attack the class settlement because they claim they were not adequately represented back in 1983, 1984 and 1987. *See Stephenson*, 273 F.3d at 251. ("This appeal requires us to determine the effect of the Supreme Court's landmark class action decisions in *Amchem* . . . and *Ortiz* . . . , on a previously settled class action concerning exposure to Agent Orange during the Vietnam War.").

Amchem and *Ortiz* are seminal opinions carefully delineating the criteria courts must consider and follow when evaluating any class settlement under Rule 23, Fed. R. Civ. P. The *Amchem* holding of this Court was improperly applied retroactively herein below, because

> when this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect **in all cases still open on direct review** and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

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27. If the Second Circuit is right, that plaintiffs here can escape the *res judicata* effect of the settlement and judgment of the trial court, the result will be catastrophic for the defendants. According to the Second Circuit, Plaintiffs were not adequately represented below because of the inherent conflict arising between those who have current injuries, those whose injuries would become manifest after the settlement but before December 31, 1994 and those whose injuries were recognized only after that date. If so, then *all parties* to the settlement could collaterally attack it because none of these groups or subclasses, nor any others that could be dreamed up, were adequately represented since counsel had divided loyalties as between and among each. Thus, any member of the class, whichever group or subclass they find themselves in has the same right to collaterally attack the judgment and seek additional compensation or other relief based upon the allegation of inadequate representation.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 96 (1993) (emphasis added). Accordingly, the Second Circuit's retroactive application of *Amchem* and *Ortiz* to sanction this attempted collateral attack contradicts clear, longstanding and well reasoned precedent to the contrary.

An example of the appropriate limits of retroactivity can be found from application of the now well recognized *Miranda* warnings. This Court did not retroactively apply *Miranda v. Arizona*, 384 U.S. 436 (1966) to release every convicted criminal who was not "read their rights" in each case finalized prior to *Miranda*. *See Johnson v. New Jersey*, 384 U.S. 719, 921 (1966) (holding that *Miranda* was to be applied prospectively only).[28] Similarly, *Amchem* should not be applied retroactively to the instant case. To do so would open every previously settled class action to such a collateral attack. Moreover and just as importantly, purported compliance with *Amchem* and *Ortiz* offers no safe haven from the type of collateral attack permitted by the Second Circuit's ruling. As here, a plaintiff simply need allege that they were not adequately represented, despite any and all attempts by the trial court to strictly comply with the holdings in *Amchem* and *Ortiz*. Allowing such collateral attacks is antithetical to the universally recognized legal policies of certainty, mutuality and finality which are essential to the proper functioning and preservation of our civil justice system.

Moreover, there are other compelling legal, equitable and public policy reasons why new legal principles should not apply retroactively in any effort to support a collateral attack on a

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28. This Court stated in *Johnson* that "[r]etroactive application of . . . *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson*, 384 U.S. at 731. Similarly, in the instant case, retroactive application of *Amchem* and *Ortiz* would disrupt finality as to tens of thousands of class members bound by settlements and judgments that were finalized in accordance with due process requirements in existence at the time.

class settlement entered into and approved more than a decade earlier. It is fundamentally unfair to settling defendants and the rest of the class and an affront to judicial economy to permit plaintiffs, who fall within a class bound by a court-approved settlement in a case finally disposed of and well after the time for direct appeal, to launch a collateral attack based on subsequent decisional law. As held by this Court for good reason, "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). Here, the situation is not at all fairly comparable to that which exists when the law changes while a case is still pending. *See Harper*, 509 U.S. at 96-98. Constitutional and policy concerns that compel a presumption of retroactivity in pending cases, such as "the prohibition of selective temporal barriers," are nowhere present here. *See Harper*, 509 U.S. at 97. The chief concern is that parties who are able to negotiate and craft a mutually agreeable settlement have sufficient confidence that it will remain undisturbed[29] once the time for direct challenge has passed.

The Second Circuit's analysis, as noted, widely opens the door to collateral attack by class members. Not only does it apply in this case, and other cases that went to final judgment well before *Amchem* and *Ortiz*, but the Second Circuit's open-door policy on collateral attack would apply equally to future

29. Predictability is critical when the business and legal realms collide. The parties and the court in the Agent Orange settlement did everything by the book and in fact and in part wrote the book, which others have since read and followed. The parties and court had a right to rely on the current status of the law which they did. No one could have predicted in 1984 or 1994 that the Second Circuit would say now that the trial court did it wrong. Especially after twice saying it did it right. To allow retroactive application of *Amchen* and *Ortiz* to this class action settlement, as well as all others previously finalized, will have a chilling effect on litigants' ability and willingness to make critical decisions in litigation, including those involving settlement in reliance on current law. They will never know when they might be whipsawed by newly crafted legal opinions, losing the benefits they bargained for under current law.

actions. The Court's holding will potentially impact hundreds of thousands of plaintiffs and those defendants who have entered into court-approved settlements with them, as is illustrated by a brief review of some relevant statistics on class action filings and settlements. For example, between 1973 and 1996 (before *Amchem* and *Ortiz*), the average number of class actions filed annually in federal courts was approximately 1,568.[30] Federal Judiciary Center researchers have determined that, in four federal district courts, 62% to 100% of certified class actions have settled. *See* Federal Jurisdiction & Procedure, 116 HARV.L. REV. 332 (Nov. 2002), *citing*, Thomas E. Willging, Laura L. Hooper & Robert J. Niemic, An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 60 (1996), available at http://www.fjc.gov. The large percent resolved by settlement is consistent with the federal court policies of encouraging settlement and minimizing protracted, expensive litigation. To allow courts to apply new legal principles retroactively to class actions settled long ago would thwart these policies.

Defendants nationwide, like petitioners here, have justifiably relied on court-approved class settlements based on the law and facts, known or knowable, when they agreed to settle and the court rendered its decision. Petitioners, like other class-action defendants, have spent hundreds of millions of dollars in reliance on the trial court's decision that, based on the applicable legal principles, the settlement was consistent with Rule 23 (as it was interpreted at the time of the class determination) which would preclude further expensive and time-consuming litigation. Petitioners here had no reason to believe that the district court's decision to approve the class settlement was potentially incorrect or could not be fully relied upon as to its finality. In fact, it was not at the time incorrect nor should it be subject to collateral attack long after it became final.

30. *See* Class Action Reports Inc., Statistics tbl.2. at http://www.classactionreports/stats2.htm (reporting federal class actions filed through 2001) (last visited Dec. 11, 2002).

Petitioners expended a substantial amount of money based on these understandings and they should not be forced to relitigate the same claims based on new law or alleged facts that did not exist at the time.

As the number of class actions filed (pending) in federal courts has risen from 1,356 in 1996 to 3,092 in 2001, it becomes even more imperative that current and future defendants who pay substantial or potentially bankrupting amounts of money to settle class claims have confidence that their court-approved settlement will not be subject to collateral attack based on law made long after the case has closed. *See* Class Action Reports Inc., *supra*, Statistics tbl.2. Furthermore, the Second Circuit's willingness to apply the *Amchem* and *Ortiz* analyses to determine the adequacy of representation in this case can only encourage plaintiffs and lawyers, who in hindsight feel "left out," "unfairly compensated," or now wish they had objected, to pursue a judicially approved but potentially disastrous second chance to challenge this and virtually every other significant class settlement. The level of uncertainty created by the retroactive application of new legal principles after the time for direct review has passed places an undue hardship on all who have invested substantial time, resources and money in multi-million and multi-billion dollar settlements, including the courts who have shepherded such class actions through various phases to ultimate resolution. Imagine the chaos that surely would ensue if all class action settlements — past, present or future — were subject to such unlimited collateral attack, as the following nine random examples demonstrate:

• *Cendant Securities Litigation*: $3.525 billion recent settlement with plaintiffs who alleged that Cendant, its predecessor corporation and three of its officers violated the Securities Exchange Act of 1934 by publishing false and misleading financial statements.[31]

31. Stanford Law School Securities Class Action Clearinghouse, at http//secutrities.standord.edu/1002/CD98/ (reporting securities class action settlements) (last visited Dec. 18, 2002).

• *Chrysler Minivan Litigation*: $120,000,000 (1995 dollars) settlement with approximately 3.3 million plaintiffs who alleged that Chrysler minivans manufactured between 1984 and 1995 have defective rear hatch door locks.[32]

• *Bjork-Shiley Convexco-Concave Heart Valve Litigation*: Estimated $215 million (1992 dollars) settlement with 51,000 plaintiffs who alleged that Pfizer, Inc. knew that heart valves sold between 1979 and 1986 could fracture and possibly cause death.[33]

• *EEOC v. Western Electric*: $66 million (1991 dollars) settlement with more than 13,000 plaintiffs who alleged that AT&T denied them pregnancy-related benefits between 1965 and 1977.[34]

• *Albuterol Ltigiation*: $150 million (1995 dollars) settlement with approximately 12,000 plaintiffs after Copley Pharmaceutical announced that its asthma spray was contaminated with bacteria.[35]

• *Airline Ticket Price Fixing*: $458 million (1993 dollars) settlement by seven major airlines with plaintiffs who alleged that these airlines conspired to artificially inflate domestic airline ticket prices.[36]

• *Haynes v. Shoney's Inc.*: $105 million (1993 dollars) settlement with more than 50,000 plaintiffs who alleged Shoney's discriminated against them based on race.[37]

• *Lucent Technologies Phone Leasing Litigation*: Approximately $300 million settlement with plaintiffs who alleged that they paid

32. *See* Vincent, Bruce, *Suit Claims Chrysler Hid Latch Defect*, TEX. LAW., Dec. 18, 1995, at 2; Big Class Action, at *http://www.bigclassaction.com/settlements/automotive.html* (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

33. *Heart Valve Maker Settles Suit*, CHI. DAILY L. BULL., Aug. 20, 1992, at 1.

34. *Settlements, Awards*, NAT'L L.J., July 29, 1991, at 6, col. 3.

35. *Asthma Spray Settlement Approved*, Nov. 27, 1995, *available in* 1995 WL 4415241.

36. Big Class Action, at http://www.bigclassaction.com/settlements/travel.html (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

37. *Judge Oks Race Bias Pact*, NAT'L L.J., Feb. 8, 1993, at 21, col.1.

"unconscionably high rental charges" to AT&T and Lucent for residential phones.[38]

• *Pondimin and Redux Litigation*: Estimated $13,200,000,000 settlement by Wyeth with approximately 370,000 plaintiffs who took the prescription diet drugs Pondimin and Redux.[39]

The view of retroactivity embraced by the Second Circuit discounts both the procedural and substantive care surrounding this settlement and defendants' judicially mandated right to peace. The uncertainty created by the possibility of collateral attack after settlement is only compounded and complicated by a rule that encourages that new decisional law be applied retroactively. Complete consideration of the facts, circumstances and public policies implicated by this attempted collateral attack leads to the conclusion that it is manifestly unfair and unjust to deprive defendants of finality in this respect. It is similarly unjust to subject every other defendant who has, or may in the future, enter into court-approved class settlements to similar collateral attacks, after a decision that is otherwise final. Defendants in class actions who compensate the class(es) through a settlement must be able to rest assured that the court's and the parties' legal assessment of the settlement's legitimacy will not be nullified based on subsequent changes in the law. At some point, "final" must mean final; in this case, that time is here and now.

Critical legal principles which have served our justice system well require that it be made crystal clear to all that the unlimited collateral attack on class action settlements encouraged and authorized by the Second Circuit's opinion is not the law.

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38. Big Class Action, at http://www.bigclassaction.com/settlements/consumer.html (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

39. Big Class Action, at http://www.bigclassaction.com/settlements/pharmaceutical.html (reporting class action settlements and verdicts) (last visited Dec. 18, 2002).

Respectfully submitted,

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